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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 246

CHARLES ANDERSON and CURTIS M. TAYLOR,

Petitioners,

v.

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI AND PETITION IN SUPPORT THEREOF

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A

MOTION FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

The petitioners, Charles Anderson and Curtis M. Taylor, respectfully move for leave to file the annexed petition for rehearing of the order of this Court, denying the joint petition for writ of certiorari in this case, entered on October 15, 1956 (*sub nom. Monroe, et al.* v. *United States*, 352 U. S. 937).

Rehearing is sought at this time on the basis of the decision of this Court in *Jencks* v. *United States*, 353 U. S. 657, rendered during the same term in which the joint petition for certiorari herein was denied, as is pointed out more fully in the annexed petition.

Although this is a consecutive petition for rehearing and is filed after the expiration of the time prescribed in Rule

58, the grounds upon which it is based arose after such time; and the Court clearly has power, in its discretion, to entertain the petition (*Clark* v. *Manufacturers Trust Co.*, 337 U. S. 953, 338 U. S. 241, 242; *Stone* v. *White*, 300 U. S. 643; *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 474; *Land* v. *Dollar*; 341 U. S. 737; *Zap* v. *United States*, 330 U. S. 800).

The motion for leave to file a second petition for rehearing in the *Zap* case, *supra*, 330 U. S. 800, and to recall the mandate was granted, after the Court's intervening decision in another case in which the Court reached a conclusion inconsistent with its disposition of *Zap's* case, on a ground not previously considered, and the judgment against him was reversed.

In *United States ex rel. Robinson* v. *Johnston*, 316 U. S. 649, a motion for leave to file a second petition for rehearing was granted, the order denying certiorari was vacated, and the petition for certiorari granted.

September 1957.

RUDOLPH STAND,
Counsel for Petitioners.

SAMUEL SÉGAL,
Attorney for Petitioners.

B

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

The petitioners, Charles Anderson and Curtis M. Taylor, pray that this Court grant rehearing of its order of October 15, 1956, denying the joint petition for writ of certiorari in this case (*sub nom. Monroe et al.* v. *United States*, 352 U. S. 873; petition for rehearing denied on December 3, 1956, *sub nom. Monroe et al.* v. *United States*, 352 U. S. 937) and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above case as prayed for in the petition heretofore duly filed herein.

Reasons for Granting Rehearing and Issuing the Writ.

1. The joint petition for certiorari tendered six questions (Petition, pp. 2-4). Question No. 2 presented for review reads as follows:

> "2 (*a*) Whether the Court erred in denying petitioners' motions for discovery and inspection of wire recordings of conversations between the prosecution witness and various defendants pursuant to Rules 16 and 17 of the Federal Rules of Criminal Procedure.
>
> (*b*) Whether it is a compliance with Rule 17 (c) of the Federal Rules of Criminal Procedure where there is an invitation by the prosecution to petitioners to be present when the prosecution would play back alleged recordings of the original recordings in this and four other cases, but only under the following conditions: (1) that no stenographer could take notes of what was played, (2) that no recording device could be used to record what was being played, (3) that no court reporter could be present, (4) that no transcript would be furnished by the government, (5) that such play-back would not be in the presence or under the

supervision of a judge, and (6) such play-back would require three full days.

(*c*) Whether it was a violation of petitioners' rights under Rule 17 (c) of the Federal Rules of Criminal Procedure, and whether the trial court erred in denying petitioners' requests that he order the prosecution to permit petitioners (1) to take stenographic notes of the aforementioned recordings or (2) to make recordings of them or (3) to have a court reporter do so, under the circumstances contained in question 3 (b) above."

2. From the Statement of the Case as set forth in the petition for certiorari (pp. 4-37) it is abundantly clear that the basic framework of the evidence against the petitioners rested completely upon the sole testimony of a police officer, Todd O. Thoman, Jr., a Lieutenant of the Metropolitan Police Department of the District of Columbia, assigned to the Gambling Squad. Lt. Thoman was the Government's principal witness.

3. Prior to the trial, the petitioners filed, among other motions, a motion pursuant to Rules 16 and 17 of the Federal Rules of Criminal Procedure, to hear, record, inspect and copy conversations had between the individual defendants and a police officer [Lt. Thoman] which had been recorded on a wire-recording device. The motion was denied and was subsequently renewed at the beginning of the trial (Tr. 115), as well as at the close of the Government's case and at the close of the entire case and was in each instance again denied (Tr. 2415, 2631, 2633).

Notwithstanding the denial of the petitioners' motions, the prosecution offered to permit petitioners' counsel merely to listen to these recordings, but imposed the arbitrary, unreasonable and dictatorial conditions that neither a stenographic transcript would be permitted to be taken

of the recordings nor the use of a recording device to record what was being played. No court reporter was present at these alleged audition proceedings. The prosecution further refused to give petitioners a transcript of the recordings.

In order to enable defense counsel to properly prepare their defense, the petitioners continued to press for the right to make stenographic transcripts of the recordings, or, alternatively to either make recordings of them or to have a court reporter do so. Counsel appeared before Judge Letts of the District Court and orally moved for such relief. In the course of their argument, defense counsel pointed out that the recordings would require three full days to be played; that many of them were difficult to hear and understand; that the recordings allegedly also contained other extraneous matters concerning other persons not involved in this case, but in four other wholly unrelated cases and that no lawyer could possibly inspect the recordings under such circumstances. After extended colloquy, the court refused to make any direction for the relief sought by the petitioners.

4. In the Reasons for Granting the Writ relating to Questions Presented 2 (a) (b) and (c), there is a strong possibility that the arguments advanced in the original petition for certiorari at pages 49-55, were not presented with sufficient clarity to warrant the allowance of the writ. Our study of the cases in this Court reveals that in a few instances, a successful petition for rehearing did no more than clarify the arguments advanced in the original petition for certiorari (*Hickman* v. *Taylor*, 327 U. S. 808, 328 U. S. 876, 329 U. S. 495; *Brinkerhoff-Faris Trust Co.* v. *Hill*, 280 U. S. 604, 550, 281 U. S. 673). These were civil cases. *A fortiori* in a criminal action which presents—as in the present case—serious questions in the administration of federal criminal justice, this Court because of its prime responsibility and supervisory power over fed-

eral practice and procedure may be persuaded to accept this case for review by reason of the matters urged in this petition.

5. On October 17, 1956—two days after the denial of certiorari herein—this Court heard argument in the case of *Jencks* v. *United States*, which was decided June 3, 1957 (October Term, 1956, 353 U. S. 657). In the light of the *Jencks* decision, we respectfully submit that a direct and explicit conflict has arisen on the questions sought to be reviewed here and is inconsistent with its disposition of the petitioners' case.

The doctrine and rationale of the *Jencks* case furnishes the most cogent reasons for a further scrutiny and consideration of the petition for certiorari herein.

6. The issue in the *Jencks* case involved the procedure under which a defendant may inspect a statement of a Government witness. At his trial, he moved for orders directing an inspection of reports made by two government witnesses as to events and activities to which they had testified at the trial. His motions were denied and he was convicted. His conviction was affirmed by the United States Court of Appeals for the Fifth Circuit, holding that the defendant was not entitled to production of these reports, since a preliminary foundation of inconsistency between the contents of the reports and the trial testimony of the government witnesses was not laid.

On certiorari, this Court reversed. In an opinion by BRENNAN, J., expressing the views of five of the members of the Court, it was held that the defendant was entitled to an order directing the government to produce the reports for his inspection, it being sufficient that they contained statements of government witnesses relating to the events and activities to which these witnesses testified at the trial and defendant was entitled to inspect such reports and to decide whether to use them in his defense.

The Court further held that only the defendant is adequately equipped to determine the effective use of government's documents for the purpose of discrediting the government's witness and thereby furthering an accused's defense.

7. The doctrine of the *Jencks* case is clearly applicable to the present case. The petitioners herein were denied due process and effective representation by counsel by rulings which were in violation of the petitioners' rights for discovery and inspection under Rules 16 and 17 (c) of the Federal Rules of Criminal Procedure.

The purpose of the Federal Rules is set forth in Rule 2 as follows:

> "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

Rule 16 was designed to permit defense counsel to properly prepare his case by inspecting and copying at any time after the filing of an indictment, books, papers, documents or tangible objects which the Government had obtained from others by process upon a showing that the items *"may be material to the preparation of his defense and that the request is reasonable."*

Rule 17 (c) also permits the court to order pre-trial inspection and is broader in scope than Rule 16, extending to documentary evidence such as books, papers, documents or other objects.

It is the petitioners' contention that the rulings of the Court with respect to petitioners' motions for discovery and inspection violated their constitutional rights under the 5th and 6th Amendments. In *Powell v. Alabama*, 287 U. S. 45 (1932) this Court held that constitutional rights of

defendants were denied when they did not have the aid of counsel in any real sense,

> "during perhaps the most critical period of the proceeding against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important * * *" (p. 57).

The Supreme Court there cited with approval (at p. 59), *Commonwealth* v. *O'Keefe*, 288 Pa. 169, 173; 148 Atl. 73 to the effect that:

> "It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case."

Both the 6th Amendment and the Due Process Clause of the 5th Amendment guarantee to those accused of crime the right to have effective and substantial aid of counsel (*Neufield* v. *United States*, 73 App. D. C. 174, 182, 118 F. 2d. 375; *Thomas* v. *District of Columbia*, 90 F. 2d. 424).

The principle stated by Judge Cooley in *People* v. *Davis*, 52 Mich. 569, 573, quoted with approval in *Gordon* v. *United States*, 344 U. S. 414, 419, 73 S. Ct. 369, 373 is equally appropriate here:

> "The state has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons.'" * * If there shall be in the possession of any of its (the State's) officers information that can legitimately tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence, the defense should be given the benefit of it."

8. It is respectfully submitted that where the proper preparation of an intricate and complex case, such as this—which involved a trial of more than a month's duration—required discovery and inspection of the documentary evidence and records hereinabove referred to, within the possession or control of the prosecutor, the denial of such discovery and inspection to defense counsel deprived defendants of their substantial rights under both the 5th and 6th Amendments.

It would be an empty gesture for the Supreme Court to have enunciated the rule that defendants are entitled to sufficient time within which to procure counsel, if at the same time the official agents of the Government may effectively deny discovery and inspection of items essential to an accused to proper preparation of a defense. A trial ought not to be regarded as a mere contest of skill between opposing counsel. It violates elementary principles of due process and the right to effective representation, to force defense counsel to come into the arena blindfolded without opportunity for preparation. One of the fundamental safeguards to an impartial trial is thus broken down and one of the securities to an impartial verdict is overthrown.

"The right to fair trial is the right that stands guardian over all other rights" (*Dennis* v. *United States*, 339 U. S. 162, 173). A fair trial is in all of the decisions of this Court declared to be one of the conditions without which due process of law cannot exist. (*Ong Chang Wing* v. *United States*, 218 U. S. 272, 279, 280; *Hill* v. *Texas*, 316 U. S. 400, 406.)

In the *Jencks* case, *supra*, 353 U. S. 657, 667-8, the Court declared that the interest of the United States in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Conclusion.

For the reasons assigned above and in the petition for certiorari, it is respectfully urged that the motion for leave to file a second petition for rehearing of the order denying certiorari be granted; that rehearing be granted and that upon such rehearing, a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit as prayed in the petition.

Respectfully submitted,

RUDOLPH STAND,
Counsel for Petitioners.

SAMUEL SEGAL,
Attorney for Petitioners.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

RUDOLPH STAND,
Counsel for Petitioners.